United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 9, 1996

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Citizens Publishing and Printing Company,
and W. Ryan Kegel and Scott R. Kegel, Alter Egos
Case 6-CA-27832-1

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This Bill Johnson's[1] case was submitted for advice as to whether the Employer filed a baseless and retaliatory lawsuit against the Union, the Employer's striking employees, and several community activists, all of whom are involved in publishing a strike newspaper.[2]

FACTS

In late 1993, Teamsters Local 261 (the Union) began an organizing drive at Citizens Publishing (the Employer) in Ellwood City, Pennsylvania. At that time, the Employer was publishing two local newspapers, the Ellwood City Ledger (the Ledger), published six days per week, and the Valley Tribune, a weekly paper for Beaver County, Pennsylvania. A representation election was held in December 1993, and on December 28 the Union was certified to represent the Employer's employees. The Ledger is presently operated by two brothers: Ryan Kegel is the publisher, and Scott Kegel is the general manager. Their father, William Kegel, ran the paper until his retirement in February, 1996.

The parties entered into negotiations but, after eighteen months of bargaining they failed to reach agreement

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[1] Bill Johnson's v. NLRB, 461 U.S. 731 (1983).

[2] The issue of whether to seek preliminary injunctive relief under Section 10(j) of the Act will be addressed in a separate memorandum.

on a collective-bargaining agreement.[3] In July 1995, the employees began an unfair labor practice strike which is ongoing. The Union embarked on a strategic campaign to gather community support for the strike, which it named "United for Survival." The striking employees and their community supporters have engaged in handbilling, prayer vigils, and other activities in support of the strike. Several other unions, organizations and individuals from the area have participated in and supported the activities of United for Survival.

In mid-August 1995, Union President Doug Campbell met with striking employees and suggested that they begin publishing a competitive strike newspaper to put bargaining pressure on the Employer, since the strike did not seem to be having any effect. The employees agreed, and in late August 1995, they began publishing the Ellwood City Press (the Press). The Press is published on a weekly basis and is distributed free of charge in the Ellwood City area. The Press has been quite successful as a local newspaper: circulation has increased from 8,000 to almost 11,000 copies weekly, with plans to expand soon to publish two issues per week. In contrast, the Employer has experienced a drop in advertising revenues for the Ledger, and circulation has dropped by about ten per cent. However, although the Press appears to be accomplishing the Union's goal of inflicting financial harm on the Ledger, the Employer has not offered to return to the bargaining table or to change any of its bargaining positions.[4]

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[3] The relationship between the parties has been acrimonious, and the parties have filed numerous charges against each other during this period. The Region issued complaint against the Employer in Case 6-CA-27215 which alleges a unilateral change in the photographer's position. A hearing in that matter was scheduled in February 1996, but was postponed pending resolution of the instant charge. All other charges filed by these parties were either dismissed or withdrawn.

[4] On January 31, 1996, the Employer filed a change in Case 6-CB-9528, alleging that the Union was violating Section 8(b)(3) of the Act by operating a newspaper in direct competition with the Employer and should have its certification revoked. The Regional Director dismissed the charge and the Office of Appeals dismissed the Employer's appeal.

The Press began publishing, and has been able to sustain operations, with money contributed by Local 261, other unions, and donations from the community. Doug Campbell negotiated the lease of office space and entered into agreements for the printing of the paper. Virtually all of the major decisions concerning the Press, and particularly financial decisions, are made by the executive board, and sometimes the general membership, of the Union. Two striking employees, Carol McDonald and Mary Ann Caputo, agreed to be named as officers and incorporators of the incorporation as a gesture in support of the strike newspaper.

The South County News is another local paper distributed in the Ellwood City area. In late November 1995, the South County News published a letter to the editor from L. David Brown, a former employee of the Ledger who now resides in Florida. Brown's letter describes how the Ledger had been a wonderful place to work when William Kegel was running the paper. The letter then stated, "When the sons took over, their word was not enough. They would promise you many things but would not stand behind their word." Brown's letter continued by praising the striking Ledger employees for standing up for their rights.

Following the publication of Brown's letter, Mary Ann Caputo, a striking employee of the Ledger and acting editor of the Press, telephoned Brown to thank him for his support. During the conversation, Caputo inquired if Brown would allow his letter to be reprinted in the Press. Brown agreed and the Press printed his letter, unchanged, in its December 30, 1995, edition.

On about January 18, 1996, Ryan and Scott Kegel filed a complaint in the Court of Common Pleas, Lawrence County, Pennsylvania, alleging that the letter by Brown was libelous. Specifically, the complaint alleged that the letter contained false statements, and that the publication of the letter was done intentionally and maliciously or with reckless disregard for the truth or falsity, or negligently and carelessly, causing the plaintiffs to suffer in their business, their reputations, their feelings and peace of mind, for great financial loss and damage. The defendants named in the complaint include the Press, United for Survival, the Union, Douglas Campbell, Mary Ann Caputo, David Brown, and nineteen striking employees of the Employer who volunteer time working for the Press.

In addition, the complaint names as defendants Mary Ann Gavrile and Charles Moser, who have volunteered their time to work on the Press and are neither employees of the Employer nor members of the Union. Gavrile is a member of Ellwood City's city council and is an unemployed school teacher. She works approximately 3-4 days per week as a substitute teacher. Gavrile has several friends among the striking employees of the Ledger, and has been publicly supportive of the strike. When the Press began its publication, Gavrile donated small items, such as toilet paper, garbage bags, etc., to the Press' office. When Gavrile is not teaching as a substitute, she often stops by the Press' office to see her friends, and sometimes helps them by answering the telephone. She once wrote a letter to the editor which was published in the Press, and on one occasion, after touring the area with some visitors from Russia in her capacity as a member of the city council, the Press published an article written by Gavrile about the experience. Moser is the former editor of the Ledger who retired voluntarily prior to the certification of the Union. Moser periodically writes a column for the Press entitled "From Over the Hill," and occasionally stops by the Press' office to visit.

As to the nineteen employees who were named as defendants in the lawsuit, none are paid for the time that they work at the Press, although they do receive strike benefits from the Union. All striking employees receive strike benefits regardless of whether or not they work at the Press. Some of the employees work at the Press only a few hours each week, while others work full time. None of the striking employees have invested any of their own money in the Press.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer's lawsuit[5] violates Section 8(a)(1) as it was filed for a retaliatory motive and is baseless.[6]

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[5] As to the Employer's responsibility for the lawsuit, compare Consolidated Edison Company, 286 NLRB 1031, 1033 (1987), with Postal Service, 275 NLRB 360 (1987).

[6] The lawsuit is therefore preempted once the complaint issues.

1. Bill Johnson's Analysis

a. Applicable Principles

The Supreme Court held in Bill Johnson's, supra, that the Board may not enjoin as an unfair labor practice the filing and prosecution of a lawsuit unless the lawsuit lacks a reasonable basis in fact or law and was commenced for a retaliatory motive.[7]

In evaluating whether a lawsuit lacks the requisite basis in fact, the Board must determine whether it raises "genuine issues of material fact" and, if so, the Board must stay its proceedings pending resolution of the lawsuit.[8] The Board may look beyond the pleadings in making such determinations;[9] however, it need not resolve credibility issues or factual disputes.[10] The burden rests on the court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged.[11] If the Board is unable to conclude that the suit lacks a reasonable basis, it should "proceed no further with the . . . unfair labor practice proceedings but should stay those proceedings until the . . . court suit has been concluded."[12]

Evidence of retaliatory motive consists of such factors as the baselessness of the lawsuit[13] and prior animus

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[7] 461 U.S. at 748-49.

[8] Id. at 745-46.

[9] Id. at 744-45.

[10] Id. at 746 n.12.

[11] Ibid.

[12] Id. at 746.

[13] Id. at 747 (Board permitted to take into consideration court's determination that lawsuit not meritorious in deciding whether lawsuit retaliatory).

towards the lawsuit defendant.[14] A retaliatory motive alone, however, is insufficient to warrant injunctive relief.[15] Consequently, the first step is to determine whether a suit possesses a "reasonable basis" in law or fact.[16]

The analysis in Bill Johnson's does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law.[17] Under San Diego Bldg. Trades Council v. Garmon,[18] a lawsuit is preempted when the activities are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. In such circumstances, the court "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[19] The only exceptions to this doctrine are where the activity is of mere peripheral concern to the Act, or where the conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the states of the power to act."[20] An example of the latter is libel.[21]

b. Reasonable Basis

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[14] H.W. Barss, at 1287 (Board concluded that libel claim retaliatory where only possible explanation was retribution for union's picketing and defamation of company president).

[15] Id. at 744.

[16] Bill Johnson's Restaurants, Inc., 290 NLRB 29, 30 (1988) (on remand).

[17] Bill Johnson's, 461 U.S. at 737 n.5.

[18] 359 U.S. 236, 244-45 (1959).

[19] Id. at 245.

[20] Id. at 243-44.

[21] See Linn v. Plant Guard Workers, 383 U.S. 53, 63-64 (1966).

Applying these principles to the instant case, we conclude that the Employer's lawsuit lacks a reasonable basis as it attacks protected labor speech.

The defendants' publication was not protected if it constituted malicious defamation or disparagement of the employer's product or reputation.[22] In determining what constitutes malice, the Supreme Court has recognized that federal labor law tolerates "intemperate, abusive and inaccurate statements," "even though the statements are erroneous and defame one of the parties to the dispute" -- absent a "malevolent desire to injure" or "a deliberate intention to falsify."[23] A defamation claim will only escape preemption if it is shown that the communications were clearly unprotected under Section 7, i.e., made with knowledge of their falsity, or with reckless disregard of whether they were true or false.[24]

The Employer alleges that the statement contained in David Brown's letter was false, or was made with reckless disregard to its truth or falsity. However, the statement was clearly made in the context of the labor dispute between the Employer and the Union and did not exceed the boundaries of permissible labor epithets. The statement merely claims that, in Brown's experience, the Kegel brothers "would not stand by their word." At its worst, the statement can be read to suggest that the Kegel brothers are liars. In these circumstances, the publication is clearly a permissible exaggeration in the communication of the Union's labor dispute with the Employer. Indeed, in Linn, supra, the Court specifically recognized that epithets such as "liar" are "commonplace in these struggles and not so indefensible as to remove them from the protection of Section 7, even though the statements are erroneous and defame one of the parties to the dispute."[25] Thus, in our view the published

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[22] Linn v. Plant Guard Workers, 383 U.S. at 64-65.

[23] Id. at 60-61 (citations omitted). See also Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) ("scab" and "traitor" held to be protected labor speech).

[24] Linn, 383 U.S. at 61, 65 (adopting malice standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[25] 383 U.S. at 60-61.

statement is a protected expression of opinion -- which cannot be knowingly false.[26]

c. Retaliatory Motive

We conclude that the Employer's lawsuit was filed and is being maintained for a retaliatory motive. First, the lawsuit retaliates against the exercise of Section 7 protected conduct. The lawsuit directly attacks the defendants' right to appeal for the public's support by publishing a letter which communicates the existence of a labor dispute.[27] The lawsuit was filed at a time when the publication of the Press was showing palpable signs of success. The paper had reached a circulation level of 11,000 and was on the verge of expanding to two issues each week. This in contrast to the Employer's decline in circulation, and a loss in advertising revenues. Thus, the Employer may have finally felt some pressure from the publication of the strike newspaper, and hence from the strike itself. The lawsuit, therefore, based on the publication of a letter expressing support for the strike effort, was in "retaliation" for that protected conduct.[28] The lawsuit may also be viewed as retaliatory because it is baseless.[29]

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[26] See, e.g., Boxtree Restaurant & Hotel, Case 2-CA-27912, Advice Memorandum dated March 20, 1995 (concluding that accusations that the Employer violated various labor laws and building codes constituted mere opinions that could not be "knowingly false"); Parc Fifty Five, Case 20-CA-24210, Advice Memorandum dated February 28, 1992 (lawsuit attacking union assertion that employer had "broken federal laws" deemed merely opinion, not fact, and therefore not "knowingly false").

[27] See, e.g., Riesbeck's, Case 6-CA-21362, Advice Memorandum dated September 6, 1989 ("as the lawsuit on its face is aimed at the exercise by the union of its protected right to handbill on the Employer's premises, its retaliatory nature is thereby established"); Delta Gas, Inc., 15-CA-10106, Advice Memorandum dated January 30, 1987 (retaliatory motive established where lawsuit related to protected activity).

[28] Phoenix Newspapers, 296 NLRB 47, 50 (1989).

[29] Bill Johnson's, 461 at 747; id. at 49.

In addition, the Employer's retaliatory motive may be inferred from the overly broad scope of the lawsuit.[30] In this regard, the Employer is suing every individual who has anything to do with the publication of the Press, even though a majority of them -- the Employer's employees -- are working on the paper on a volunteer basis, without any real decision-making authority. As a newspaper publisher, the Employer should know that the volunteers would have no real influence on the publication. Yet, by pleading as a defendant everyone and anyone who works on the paper, the Employer, in effect, attacks its striking employees because of their involvement with the strike newspaper which is protected labor activity. Further, the overly broad scope of the lawsuit as to defendants would clearly chill the Section 7 activities of striking employees and undermine strikers' attempts to solicit community support. Moreover, we note that the lawsuit was filed in the context of an ongoing unfair labor practice strike. The parties negotiated for 17 months without reaching a contract and, as the Region notes, numerous charges and counter-charges have been filed. Thus, retaliatory motive may be inferred from the acrimonious relationship between these parties.[31]

Finally, we conclude that the Employer's libel claim is preempted once complaint issues. In Loehmann's Plaza,[32] the Board held that once a complaint issues alleging violations involving arguably protected activity, any state court lawsuit concerning the question is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1). A respondent therefore has an affirmative duty to take action to stay the state court lawsuit within seven days following issuance of the Board complaint.[33]

2. Gavrile and Moser

Finally, in agreement with the Region, we conclude that the Employer violated Section 8(a)(1) by naming Mary Ann Gavrile and Charles Moser as defendants in the lawsuit.

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[30] See discussion, infra, as to Gavrile and Moser.

[31] Machinists Lodge 91 (United Technologies Corp.), 298 NLRB 325, 326 (1990), enf'd 934 F.2d 1288 (2d Cir. 1991).

[32] 305 NLRB 663, 670 (1991).

[33] Id. at 671.

Neither Gavrile nor Moser are employees of the Employer. Gavrile has never been an employee of the Employer, and Moser retired from his position before the Union was certified to represent the Employer's employees. However, both of these individuals have given their support to the Union and striking employees by giving their time and articles to the strike newspaper. The lawsuit will require both individuals to devote considerable time and expense to defend themselves as well as possible harm to their reputations. By including them in the lawsuit, the Employer has sent a clear message to all employees as to what can happen to any individual, regardless of whether or not they are an employee of the Employer, if they support the strikers in this labor dispute. This message is certain to have a chilling effect on the willingness of employees to exercise the rights guaranteed them under the Act.

The Board has addressed an analogous situation where an employer physically attacks or causes the arrest of a non-employee, usually a union representative, within the view of employees.[34] In those cases, even though the victim is not an employee, the Board finds such conduct violates the Act since an employee viewing such conduct would likely infer that the employer would also retaliate in the same fashion against any employee who supported the union.[35] Similarly, in this case, by naming Gavrile and Moser as defendants in its lawsuit, the Employer is sending a clear message to its employees as to what can happen to them if they support a strike.

3. Conclusion

In accordance with the above analysis, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer filed and is maintaining a retaliatory lawsuit against all the named defendants lacking a reasonable basis in fact and law.

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[34] See, e.g. Horton Automatics, 289 NLRB 405, 411 (1988); Village IX, Incorporated d/b/a Shenanigans, 264 NLRB 908, 921 (1982); Heavenly Valley Ski Area, 215 NLRB 359, 361 (1974); and Sullivan Surplus Sales, Inc., 152 NLRB 132, 149 (1965).

[35] Horton Automatics, 289 NLRB at 411.

B.J.K.